

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HODELL-NATCO INDUSTRIES, INC.)	CASE NO. 1:08 CV 2755-DCN
)	
Plaintiff,)	JUDGE NUGENT
)	
v.)	
)	
SAP AMERICA, INC., et al.)	
)	
Defendants.)	
)	

TRIAL BRIEF OF DEFENDANTS SAP AMERICA, INC. AND SAP AG

Defendants SAP America, Inc. and SAP AG (collectively, “SAP”), in compliance with the Court’s Civil Jury Trial Order, dated May 12, 2015, and in accordance with the pretrial conference held with the Court on June 2, 2015, make the following pretrial submission.

I. TRIAL BRIEF

As discussed during the pretrial conference on June 2, 2015, SAP refers the Court to the parties’ Joint Trial Brief, dated October 9, 2014 (ECF # 245) and SAP’s Status Report filed May 28, 2015 (ECF # 320). The Joint Trial Brief includes, *inter alia*, a Joint Stipulation of Facts; a Joint Statement of Facts; and a Statement of Law, including the reasons why SAP believes it will be entitled to judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. SAP’s Status Report summarizes the remaining causes of action and open matters awaiting the Court’s ruling.

The most notable open issue relates to Judge Wells’s recent request for briefing on the issue of whether Hodell’s CEO, Otto Reidl, may offer damages opinion testimony where such testimony is clearly outside the proper bounds of Federal Rule of Evidence 701 and otherwise parrots the already (and properly) excluded opinions and testimony of Hodell’s purported damages expert, Dr. G. William Kennedy. SAP’s clear understanding was that Judge Wells intended to rule upon the issue of Mr. Reidl’s damages testimony prior to the start of trial. Moreover, absent a pretrial ruling on this issue, SAP faces significant prejudice inasmuch as Hodell no doubt intends to feature Mr. Reidl’s clearly inadmissible opinions in its opening statement. This issue has been fully briefed, and Mr. Reidl’s opinions should be precluded before the start of trial.

In accordance with this Court’s Civil Jury Trial Order, dated May 12, 2015, SAP has also properly sought reconsideration of certain prior rulings that have a significant impact on this case. This includes the issues of whether Hodell can pursue an un-pled claim based on

concealment where there was no duty to disclose; whether Hodell can proceed with a fraud claim that arises from issues addressed in its contract with SAP; and whether Hodell can offer extrinsic evidence to contradict the clear terms of its contract with SAP on the issue of agency.

II. SAP'S PROPOSED WITNESSES

The following is the list of witnesses SAP expects to call to testify at trial. SAP reserves the right to call as needed on cross-examination any party and any witness listed by the plaintiff and/or to counter-designate deposition testimony for witnesses identified by the plaintiff.

A. Fact Witnesses SAP Expects to Call at Trial

- Penelope Vitantonio (6100 Oak Tree Blvd., Ste. 200, Independence, OH 44131). Ms. Vitantonio is a current SAP employee and will appear in person at trial. Ms. Vitantonio is a Marketing Manager, SAP America. At the times relevant in this case, Ms. Vitantonio was employed by American Express and is knowledgeable about early meetings with Hodell concerning software.
- Ralf Mehnert-Meland (102 Broadway, Fargo, ND 58102). Mr. Mehnert-Meland is the former Director Business Development & Director Global ISV Channel, SAP Business One, and has agreed to appear in person at trial. Mr. Mehnert-Meland is knowledgeable about Business One and SAP's efforts to resolve Hodell's purported complaints.
- Dan Kraus (10238 Edgecliff Road, Huntersville, NC 28078). Mr. Kraus is the former V.P. SAP Business One and has agreed to appear in person at trial. Mr. Kraus is knowledgeable about Business One and SAP's efforts to resolve Hodell's purported complaints.
- Edward Neveux (29 Groton Drive, Concord, NH 03301). Mr. Neveux is a current SAP employee and will appear in person at trial. Mr. Neveux is a Solution Architect, SAP

Business One, and is knowledgeable about Business One and SAP's efforts to resolve Hodell's purported complaints.

- Paul Killingsworth (5215 N. O'Connor Blvd., Ste. 800, Irving, TX 75039). Mr. Killingsworth is a current SAP employee and will appear in person at trial. Mr. Killingsworth is the Director Solution Experts & Customer Relations, SAP Business One, and is knowledgeable about Business One and SAP's efforts to resolve Hodell's purported complaints.
- Marcia Weissman (18169 Big Oaks Road, Gages Lake, IL 60030). Ms. Weissman has agreed to appear in person at trial. Ms. Weissman is a former Implementation Consultant, LSi-Lowery Systems, Inc. and The IBIS Group, Inc., and is knowledgeable about the development of Hodell's custom software solution and the implementation of that solution.
- Joseph Guagenti (1330 Brook Street, Apt. G, St. Charles, IL 60174). Mr. Guagenti has agreed to appear in person at trial. Mr. Guagenti is the former Technical Service Director & Lead Programmer, LSi-Lowery Systems, Inc. and The IBIS Group, Inc. Mr. Guagenti is knowledgeable about the development of Hodell's custom software solution.
- Terry Phillips (618 Tuxedo Avenue, Brooklyn Heights, OH 44131). SAP expects to present Mr. Phillips in person at trial pursuant to a subpoena. Mr. Phillips is Hodell's former IT Project Manager and is knowledgeable about, *inter alia*, Hodell's failed efforts to test the software solution before going live.
- Hodell corporate designee and/or custodian of records in response to SAP's trial subpoena.
- Geoffrey Ashley (11 Ministerial Road, Bedford, NH 03110). SAP understands that Hodell has served a subpoena to conduct Mr. Ashley's testimony via remote video during trial. SAP reserves the right to call Mr. Ashley during its case. Mr. Ashley is the former Director North

Amer. Sales, SAP Business One, and is knowledgeable about SAP's efforts to resolve Hodell's purported complaints.

- Daniel Lowery (7701 Lansdowne, Shrewsbury, MO 63119). Mr. Lowery is the president and an owner of LSi-Lowery Systems, Inc. and The IBIS Group, Inc. Hodell has represented that Mr. Lowery is agreeing to appear in person at trial. SAP reserves the right to call Mr. Lowery during its case. Mr. Lowery is knowledgeable about Hodell's efforts to develop custom software.
- Dale Van Leeuwen (40037 Red Hawk Court, Saint Charles, IL 60175). Mr. Van Leeuwen is an owner of LSi-Lowery Systems, Inc. and The IBIS Group, Inc. SAP understands that Hodell is serving a subpoena to conduct Mr. Van Leeuwen's testimony via remote video during trial. SAP reserves the right to call Mr. Van Leeuwen during its case. Mr. Van Leeuwen is knowledgeable about Hodell's efforts to develop custom software.

B. Fact Witnesses Being Offered By Deposition

- At present, it is anticipated that testimony from Udi Ziv and Jon Woodrum will be presented by video deposition testimony only. The parties previously exchanged designations and objections to this testimony, and these were ruled upon by the Court. SAP understands that Hodell intends to offer these witnesses during its case, and SAP believes that in accordance with Federal Rule of Civil Procedure 32(a)(6), and to otherwise avoid confusion as discussed during the pretrial conference, all designations should be played in the order they appear in the transcripts of these witnesses.

C. Expert Witnesses SAP Expects to Call at Trial

- Brooks Hilliard (11811 North Tatum Blvd., Ste. 3031 Phoenix, AZ 85028). Mr. Hilliard will appear in person at trial. Mr. Hilliard will testify in keeping with his expert report and any evidence offered during trial.
- Geoffrey H. Osborne (2 Great Woods Lane, Malvern, PA 19103). Mr. Osborne will appear in person at trial. Mr. Osborne will testify in keeping with his expert report and any evidence offered during trial.

D. Fact Witnesses SAP May Call If the Need Arises

- Otto Reidl (1363 Homestead Creek Drive, Broadview Heights, OH 44147). Mr. Reidl is the CEO of Hodell. SAP reserves the right to call Mr. Reidl during its case if the need arises.
- Kevin Reidl (510 River Road, Hinckley, OH 44233). Mr. Reidl is the President of Hodell. SAP reserves the right to call Mr. Reidl during its case if the need arises.
- Joseph Vislocky (14715 Teal Drive, Chardon, OH 44024). Mr. Vislocky is the former IT Director, Hodell, and SAP understands that he is testifying in person during plaintiff's case pursuant to subpoena. SAP reserves the right to call Mr. Vislocky during its case if the need arises.

III. SAP'S PROPOSED EXHIBITS

In accordance with the Court's Civil Jury Trial Order, dated May 12, 2015, a revised index of SAP's proposed exhibits is attached hereto as Exhibit A. This index also provides a description of any substantive ruling Judge Wells previously made and, where applicable, additional explanatory comments. The parties have not yet conferred on the labeling of joint exhibits, but SAP believes the following exhibit numbers to be joint exhibits: 9, 11, 24, 30, 32,

68, 87, 89, 119, 122, 124, 129, 130, 131, 151, 157, 159, 160, 166, 217, 227, 258, 263, 264, 266, 281, 291, 294, 299, 300, 301, 441, 448, 450, and 453.

IV. EVIDENTIARY ISSUES LIKELY TO ARISE AT TRIAL

As noted in its objections to Hodell's first proposed trial exhibit list (ECF # 228), SAP expressly reserved the right to supplement any of its prior objections either prior to or during trial. Accordingly, SAP intends to raise objections to, among others, Hodell's proposed exhibits nos. 25, 173, 174, 267, 447, 601, and 607. SAP further intends to object to – and request the redaction of – certain irrelevant and highly prejudicial language contained in Hodell's proposed exhibits nos. 42, 53, 67, 79, 84, and 259. SAP further reserves the right to raise any evidentiary issues as they arise.

As indicated above, with regard to the video deposition testimony of Messrs. Ziv and Woodrum, SAP believes that in accordance with Federal Rule of Civil Procedure 32(a)(6), all designations should be played in the order they appear in the transcripts of these witnesses.

V. SAP'S PROPOSED VOIR DIRE

SAP's proposed voir dire questions are attached hereto as Exhibit B.

VI. SAP'S PROPOSED JURY INSTRUCTIONS

SAP's proposed jury instructions are attached hereto as Exhibit C. A copy will also be submitted to the Court by email once the parties have completed the process of conferring on their respective proposed instructions.

VII. SAP'S DEPOSITION DESIGNATIONS

SAP's deposition designations for Otto Reidl and Kevin Reidl are attached hereto as Exhibit D. The parties have previously exchanged designations for Udi Ziv and Jon Woodrum.

Respectfully submitted,

June 10, 2015

/s/ Gregory J. Star
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June 2015, a copy of the foregoing Trial Brief, along with exhibits thereto, was filed and served via ECF.

/s/ Gregory J. Star
Gregory J. Star (admitted *pro hac vice*)